U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 24 August 2004

BALCA Case No.: 2003-INA-246
ETA Case No.: P2000-CA-09508568

In the Matter of:

FINNIGAN CORP.,
Employer,

on behalf of

VERNON CROWTHER,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Jeffrey Rummel, Esquire
San Francisco, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Finnigan Corporation ("the Employer") filed an application for labor certification[1] on behalf of Vernon Crowther ("the Alien") on February 7, 2000. (AF 30).[2] The Employer seeks to employ the Alien as a systems service engineer. This decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

In the application, the duties of the position included training customers to use the machines and application methods, testing, fixing, and performing maintenance on machines, as well as knowledge of mass spectrometers and simple and complex detection systems. The Employer required a Bachelor's degree in electrical or electronic engineering and three to five years of experience in the job offered or three to five years of experience in maintenance, testing, and repair of mass spectrometer systems. The job did not require supervision of other employees. (AF 30).

In the Notice of Findings ("NOF"), issued February 3, 2003, the CO agreed with the Employer that the position should be that of Electrical and Electronic Engineering Technician. The CO found the prevailing wage of $57,242 was not met by the Employer's offer of $50,000. The CO instructed the Employer either to amend the wage and to retest the labor market or to justify the wage offered with documentation that the wage offered is within five percent of the prevailing wage for workers similarly situated in the area of intended employment. In addition, the CO found that the Employer failed to document that its requirements for the job opportunity represented the actual minimum requirements because it appeared that the Alien was hired in September 1991 without the three to five years mass spectrometer experience. The CO also found that a U.S. applicant appeared qualified for the job opportunity, yet was unlawfully rejected. (AF 26-28).

In its rebuttal, dated March 25, 2003, the Employer argued that the prevailing wage of $50,000 was confirmed by the EDD as meeting the prevailing wage prior to recruitment on May 31 and June 1 and 2, 2000. The Employer argued that this was a lack of fundamental fairness because the Employer relied upon instructions received from the California EDD at the time of recruitment. The Employer submitted documentation to support the assertion that the Alien gained the minimum three to five years of experience from April 1991 through April 1996 with Fisions Instruments, which was acquired by the Employer in April 1996. The Employer argued that the Alien's experience was not with

the present employer and such experience was relevant work experience. Finally, the Employer argued that the applicant's work with semiconductor capital equipment and integrated circuit tests and handlers is not an area in which the Employer is engaged and his background is simply inappropriate for the job opportunity being offered. (AF 12-24).

In the Final Determination ("FD"), issued on May 15, 2003, the CO stated that the Employer's rebuttal to the prevailing wage determination noted only that the Employer should not have to pay more than what had been determined for the original occupation. The Employer did not argue that the wage was improperly applied to the new occupation. The CO stated that the Employer's argument was not accepted and labor certification could not be granted. In addition, the CO found that because the previous company for whom the Alien gained the experience required in the job offered is now an integral part of the present corporation, the Alien's experience would be the same as if he had worked for the principal company all along. Therefore, the Employer's petition did not state the actual minimum requirements. The CO found that the Employer's argument that the U.S. applicant did not show experience in the specialty in which the Alien gained experience with the Employer is not a valid, job-related reason for rejecting a U.S. applicant. Therefore, the application for labor certification was denied. (AF 9-10).

On May 22, 2003, the Employer requested review, reiterating arguments set forth in its rebuttal. Specifically, the Employer argued that the prevailing wage is being offered and the CO improperly imposed a new wage rate nearly three years after the state employment service determined that its offered salary met the prevailing wage for the position. In addition, the Employer argued that documentation submitted with the rebuttal statement establishes that the Alien gained the qualifying experience for this job opportunity while he was employed with a company not affiliated with the Employer. The Employer argued that therefore, the experience required for the job opportunity is the minimum experience requirement and the U.S. applicant failed to meet that minimum requirement. (AF 8).

The case was docketed by the Board on July 29, 2003. In a letter dated September 2, 2003, the Employer stated that it would rely upon the arguments and documentation set forth in the rebuttal statement of March 25, 2003 and the request for review dated May 22, 2003.

DISCUSSION

The general rule is that "[a]n employer seeking to challenge a prevailing wage determination . . . bears the burden of establishing both that the CO's determination is in error and that the employer's wage offer is at or above the correct prevailing wage." *PPX Enterprises, Inc.,* 1988-INA-25 (May 31, 1989) (*en banc*). In addressing the Employer's argument that it relied upon confirmation of the wage offered by the California EDD prior to recruitment, the CO is not bound by any statements or actions by the local employment service in his review of the application, including the local employment service's finding that the wage offer was within regulatory guidelines. *Aeronautical Marketing Corp.,* 1988-INA-143 (Aug 4, 1988).

In this case, the local employment agency certification was for the original DOT job code and specifically stated that it was only valid through December 31, 2000. As noted by the CO in the NOF, this job code was later amended and therefore required an amended prevailing wage determination. In addition, on May 3, 2000, the local employment office notified the Employer that the application had been reviewed and the Employer had been notified of any potential issues. While the local employment office stated that it was ready to assist with recruitment, it also stated: "[t]his does not mean we endorse any restrictive requirement(s) or low wage you have selected to retain." (AF 65-67).

Based on all these considerations, the Employer has not met its burden in establishing the CO's determination of the prevailing wage was in error. First, as noted above, the CO is not bound by local employment agency statement or actions. Thus, the Employer can not rely on the certification by the California EDD that the wage offered

met the prevailing wage standard. Further, the prevailing wage determination was only valid through December 2000 and was for the initial job code, not the amended job code, which involved a more complex position. Once the Employer's amended job code was accepted in the NOF, the Employer was offered the opportunity to amend the prevailing wage and to retest the job market. The Employer did not pursue this alternative, but rather argued that the wage was justified based on a reliance on the state certification for the initial position. The Employer's arguments are not sufficient and therefore the Employer has not established that the CO's determination was in error and that the wage offered is at or above the correct prevailing wage. Thus, the CO properly denied certification.[3]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk

[3] Because the CO's denial of certification is affirmed on these grounds, it is unnecessary to reach the other grounds on which certification was denied.

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Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.